United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

76-1182

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1182

UNITED STATES OF AMERICA,

Appellee,

v.

JANET TERRI,

Defendant-Appellant.

Appeal from a Judgment of Conviction in the
United States District Court for the
Eastern District of New York

BRIEF FOR APPELLANT JANET TERRI

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Statement of the Issues

(1) Whether, when the prosecution has failed to prove a defendant's participation in an alleged conspiracy by a fair preponderance of evidence other than hearsay utterances of an alleged co-conspirator, the Trial Judge may permit the jury to consider the hearsay utterances of the alleged co-conspirator on the question of the defendant's guilt?

(2) Whether, when trial counsel was assigned to defendant, over her protests, on the last business day before trial, did not confer with defendant until a few minutes before the beginning of an 8-day trial, had insufficient time to prepare her defense, did not call defendant to testify in her own defense, called as a witness for her only a Government agent who had interviewed her during the investigation, and was wholly unprepared to, and so did not, adduce the evidence which was available to the defendant as proof of her innocence, and as a result defendant was inadequately represented at trial, defendant has been deprived of her Constitutional right to the effective assistance of counsel?

Statement of the Case

Preliminary Statement Pursuant to § 28

The Honorable Thomas C. Platt, United States District Judge for the Eastern District of New York, rendered the judgment appealed from, following trial by jury. No decision or supporting opinion is reported.

The Course of Proceedings

Defendant Janet Terri Ferry (Ferri is her married name) was convicted, with others, on a two-count indictment for violation of 18 U.S.C. §§ 371, 659, and 2. The indictment alleged in its first count that Ms Terri and others had conspired to receive and possess watches stolen at John F. Kennedy Airport while the watches were moving as part of a foreign shipment of freight. The second count accused her and others of receiving and possessing the stolen watches. In neither count was it alleged that Ms Terri had stolen anything, and the only overt act attributed to her in Count 1 was allegedly making a telephone call on or about March 21, 1975.

The indictment was filed June 16, 1975. Ms Terri was arraigned on July 3, 1975, and entered a plea of not guilty.

On July 8, 1975, the attorney for another defendant, Donald Walsh, moved on behalf of Mr. Walsh and Ms Terri for discovery and inspection, bill of particulars, and production of evidence favorable to defendants. The discovery motion was with-

drawn on July 18, after service by the government of a Bill of Particulars and a Response to the Omnibus Motion solely in response to defendant Walsh.

Trial Counsel was appointed for Ms Terri by the Court on January 16, 1976, Ms Terri being financially unable to obtain counsel and her prior assigned counsel having become unavailable. Counsel so appointed, Marshall Kaplan, Esq., served as trial counsel.

Trial commenced January 19, 1976. Trial occupied eight days and was concluded January 29, 1976.

Disposition in the Court Below

At the conclusion of trial, the jury returned a verdict of guilty on both counts against Ms Terri. On April 9, 1976 the Court sentenced her to 3 years imprisonment on each count, the sentences to run concurrently. She was to serve 6 months, the execution of the balance of the sentence to be suspended, and was placed on probation for 3 years. Ms Terri was also fined $5,000 on each count, for a total fine of $10,000.

Notice of appeal in forma pauperis was duly filed April 9, 1976. The record was certified and transmitted April 19, 1976.

The Facts

The only testimony offered by the prosecution against Ms. Terri was that of alleged co-conspirators who had previously pleaded guilty to a count of the indictment and whose sentencing had been adjourned without date.

Peter Areiter, a truckdriver (241a) testified that on the evening of March 17, 1975 (245a) he took some unmarked boxes to the house where Ms Terri lived with her three children (254a). (The house in question does not belong to Ms Terri, but to her parents [354a-355a].) He saw no one in the house at that time (256a).

Thomas M. Burns gave similar testimony that he unloaded unmarked boxes into what he, too, wrongfully called Ms Terri's house, and that he saw neither Ms Terri nor anyone else there (SM 434).

On March 17 and March 18, 1975, Ms Terri was at the Jug End resort in South Egremont, Massachusetts (354a).

The principal witness for the prosecution was Robert Schoenly, formerly bartender at the Tic Toc cocktail lounge in Lynbrook, New York (89a-90a). Schoenly testified that Ms Terri had formerly been a "barmaid" at the cocktail lounge (98a). He further testified that on March 21, 1975, Ms Terri and defendant Walsh came into the Tic Toc at about 2 in the afternoon.

Schoenly testified that Walsh instructed him to go to Hub Rental and rent a "step-in van". Schoenly further testified that Walsh (not Ms Terri) had said that Ms Terri had

called Hub Rental to see if Hub had the type of van Walsh wanted (99a). He testified further that Walsh had told him, Schoenly, to say to Hub Rental that his "sister" had called (100a). He received money from them which he used for the rental (102a).

Schoenly testified to renting the truck and parking it near Ms Terri's parents' house, and returning to the Tic Toc bar, where he found Walsh and Ms Terri. He gave further testimony as to a conversation with Walsh about moving the shipment. There was no testimony that this conversation took place in Ms Terri's presence (104a-109a).

Schoenly further testified that after he was subpoenaed to testify before the Grand Jury, one of the "conspirators", in the presence of Ms Terri, advised him to plead his Constitutional privilege against testifying (134a-136a).

Schoenly testified upon cross-examination that when he first gave a statement to the FBI in connection with the investigation of the matter, he stated that defendant Joyce -- and not either Walsh or Ms Terri -- had asked him, on March 21 between 3:00 and 4:00 a.m., to rent a truck from Hub Rental (188a), although the FBI agent questioning him had mentioned the names of both Mr. Walsh and Ms Terri (190a-191a).

Schoenly further testified that although he had referred several times to "Janet Terri's house" he thought it probable the house was in fact owned by her parents (216a-217a).

On March 21, when the packages and boxes were moved from the house, Mr. Schoenly, who was present, did not see Ms.Terri. He at r[illegible]e saw Ms Terri hold, handle, touch, or have in her pos[illegible]ession any of the boxes in question (217a-218a).

Defendant Louis Bovell, testifying in his own behalf, confirmed the prosecution's evidence that on March 21 Ms Terri was not at the house (338a).

POINT I: WHERE THE PROSECUTION HAD FAILED TO PROVE DEFENDANT TERRI'S PARTICIPATION IN A CONSPIRACY BY A FAIR PREPONDERANCE OF THE NON-HEARSAY EVIDENCE, IT WAS ERROR TO PERMIT THE JURY TO CONSIDER HEARSAY UTTERANCES OF ALLEGED CO-CONSPIRATORS ON THE QUESTION OF HER GUILT

In United States v. Geaney, 417 F.2d 1116 (2nd Cir. 1969), cert. den. 397 U.S. 1028, this Court defined the duty of the judge in determining the evidence a jury may be allowed to consider in determining the guilt of an alleged conspirator.

> "The circumstance that in a conspiracy trial the preliminary issue on the admissibility of evidence coincides with the ultimate one of the defendant's guilt should not cause the trial judge to abdicate his traditional duty to decide those issues of fact which determine the applicability of a technical exclusionary rule. When the matter is viewed from the standpoint of the trial judge, it may be hard to say more than that he must satisfy himself of the defendant's participation in a conspiracy on the basis of the non-hearsay evidence. Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 Harv.L.Rev. 165, 182-89 (1929). See also Maguire and Epstein, Preliminary Questions of Fact in Determining the Admissibility of Evidence, 40 Harv.L.Rev. 392, 415-20 & n. 20 (1927). Setting the standard that high avoids the risk that the requirement of independent evidence will be rendered 'virtually meaningless,' as some courts are said to have done. See Note, Developments in the Law--Criminal Conspiracy, 72 Harv. L.Rev. 922, 987 (1959). While the practicalities of a conspiracy trial may require that hearsay be admitted 'subject to connection,' the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt. If it has not, the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as

to render a cautionary instruction of doubtful utility, as could well have been the case here, declare a mistrial if the defendant asks for it. * * *" 417 F.2d at 1120 [emphasis supplied].

This Court cited Geaney with approval in United States v Calarco, 424 F.2d 657 (2nd Cir. 1970), observing:

> "As has been many times stated, the rule is that before the jury may be permitted to consider other conspirators' hearsay utterances in furtherance of the conspiracy as a means of determining a particular defendant's guilt beyond a reasonable doubt, the trial judge must first conclude from all the evidence that the defendant in question has been shown to be a member of that conspiracy 'by a fair preponderance of the evidence independent of the hearsay utterances.' United States v. Geaney, 417 F.2d 1116 (2 Cir. Nov. 6, 1969). * * *" 424 F.2d at 660.

At the trial, there was no evidence except hearsay testimony of Schoenly, a confessed conspirator awaiting sentence, of any act or statement by Ms Terri from which anyone could fairly infer her participation in an unlawful confederation. The prosecution's own witnesses, Areiter and Burns, testified only that they carried unmarked pacakages into a house owned, not by Ms Terri but by her parents, at a time when she, concededly, was in Massachusetts. The boxes were later removed: the prosecution witnesses testified that Ms Terri was not present on that occasion, either (nor were her parents). There was no testimony that any inhabitant of the two-family house admitted either the bringers-in or the takers-out of the stolen watches, or that any resident of the house was seen at the premises. (Donald Walsh, described as Ms Terri's "boy friend", was present on both occasions.) There is nothing in the record to show that Ms. Terri

ever saw, held, or knowingly had in her possession at any time any of the stolen watches, or the boxes in which they were packed. The government agent and two policemen who searched the house a few days after the crime found no trace that the boxes of watches had ever been there, and it is a fair inference that on her return from Massachusetts Ms Terri saw no signs of what had been stored in the basement.

Thus, there was not only no "fair preponderance" of non-hearsay evidence of participation by Ms Terri in a conspiracy to receive and possess stolen goods, there was no such evidence at all. The Court below, therefore, pursuant to this Court's holdings, had an obligation to instruct the jury that they must disregard the hearsay testimony of Schoenly to what he asserted defendant Walsh -- not Ms Terri -- had said Ms Terri had said or done outside Schoenly's presence. This hearsay evidence of Schoenly, inadmissible against Ms Terri, was the only trial testimony which purported to show participation by Ms Terri in the acts of the conspiracy. It was therefore prejudicial error, not harmless error, to allow the jury to consider the hearsay in determining her guilt or innocence; and the conviction on the first count should be reversed.

A fortiori, there was no evidence at trial that Ms Terri ever received or had in her possession any of the stolen goods. Although the conspirators seem to have handed samples about in public with some freedom, she never had one. It was therefore error to permit the second count as against Ms

Terri to go to the jury, and the conviction on that count should also be reversed.

POINT II: DEFENDANT TERRI WAS DEPRIVED OF HER CONSTITUTIONAL RIGHT TO EFFECTIVE COUNSEL

The Fifth Amendment to the Constitution of the United States, provides, in relevant part, that

> "No person shall * * * be deprived of life, liberty, or property, without due process of law".

The Sixth Amendment guarantees that

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defence."

It has been established law since Powell v. Alabama, 287 U.S. 45 (1932), that due process and the Sixth Amendment require that the accused in criminal prosecution have not only the "Assistance of Counsel for his defence* * *" but the assistance of effective counsel.

In Powell, no attorney had been definitely designated to represent the defendants until the morning of the trial. Thus, the Court said,

> "during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."
> 287 U.S. at 57 (Emphasis supplied)

The Court then examined what the results of the tardy appointment of counsel necessarily were.

> "It is not enough to assume that counsel thus precipitated into the case thought there was no defense, and exercised their best judgment in proceed-

ing to trial without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given. Defendants were immediately hurried to trial. Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: '. . . the record indicates that the appearance was rather pro forma than zealous and active . . . ' Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities."
287 U.S. at 58 (Emphasis supplied)

The Court held that in the circumstances

"it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."
287 U.S. at 71 (Emphasis supplied)

In United States v. Helwig, 159 F.2d 616 (3rd Cir. 1947), a conviction for transporting a stolen automobile in interstate commerce was reversed because counsel for defendant had been appointed shortly before trial. The Court of Appeals stated:

"We are of the opinion that counsel for an indigent defendant, held in custody, must be appointed by the court sufficiently far in advance of trial to enable counsel adequately to prepare the defense. In the case at bar the period given for preparation was too brief."
159 F.2d at 618

In United States v. Koplin, 227 F.2d 80 (7th Cir. 1955), convictions for income tax evasion were reversed on the ground that defendants had been denied their right to assistance of counsel as guaranteed by the Sixth Amendment. Defendants' counsel had been led to believe by the minute

clerk of the trial judge and the assistant prosecutor in charge of the case that the case would not be reached for trial in the near future. The Court shortly thereafter advanced the case for immediate trial. Counsel then moved for a continuance on the ground that he had not completed the preparation and was, further, engaged in preparing another trial. The continuance was denied.

On the date the Koplin case came up for trial, counsel had been ordered to trial in his other case. When an associate (one McDonald) attempted to explain the problem to the judge in the Koplin case, the Court rejected the explanation and appointed the associate as attorney for Koplin and another defendant although the associate had said he was unqualified in the circumstances.

These events occurred on a Wednesday. The following day was Armistice Day, a holiday. The trial began on Friday, despite a motion for continuance filed that day by defendant Koplin.

The Court, in reversing the conviction, stated:

> "The fact that McDonald was given forty-eight hours (including Armistice Day) to prepare for trial, taking into consideration the character and complexity of the cases, reduces his appointment to nothing more than a mere formality. It is hardly conceivable that a lawyer with the wisdom of Solomon could have been prepared to conduct a defense properly under such circumstances." 227 F.2d at 86

In Townsend v. Bomar, 351 F.2d 499 (6th Cir. 1965), counsel for defendants had been appointed the day of trial. They conferred with the defendants--there was some dispute

whether for 15 to 20 minutes or an hour or two--and talked with the principal witness against them, but made no further investigation of the facts. No application was made for a continuance.

In vacating the convictions, the Court of Appeals noted:

> "The District Judge made findings that the attorneys were eminently well qualified and conducted a vigorous defense. But conceding the truth of this evidence, it can hardly serve as a substitute for adequate preparation for trial, which, in our judgment, could not be made in such a short time as was provided in this case.
>
> * * *
>
> "The efforts of the state to provide for a speedy trial of a criminal case are laudable, but certainly they must be exercised with due regard for the constitutional right of the defendant to have adequate time to prepare his defense."
> 351 F.2d at 501

In United States v. Knight, 443 F.2d 174 (6th Cir. 1971), the attorney defendants believed represented them failed to appear when the case was called and later stated he did not represent them. The Court gave defendants one day to obtain new counsel. The new counsel's motion for a continuance was denied and a recess of 30 minutes was granted before the trial began so that counsel could discuss the case with the defendants.

In reversing the convictions for violating the whiskey laws, the Court of Appeals stated:

> "We hold that prejudice is inherent under the facts and circumstances of the present case. The newly employed attorney for appellants, no matter how competent and experienced, could not be expected to prepare adequately during a thirty minute recess for a trial which would extend over a period of two days.
>
> * * *

"We hold that the complete denial of any opportunity for counsel to prepare for the defense of a not guilty plea in a case set for immediate trial under the facts and circumstances of the present case is so fundamentally unfair that a conviction resulting therefrom cannot be permitted to stand."
443 F.2d at 178

In Fields v. Peyton, 375 F.2d 624 (4th Cir. 1967), the Court of Appeals, in reversing a State conviction, held:

"Courts are required to allow counsel sufficient time to inform themselves fully, to reflect maturely and to prepare thoroughly in the cases to which they are assigned, and courts can no longer tolerate perfunctory performance by appointed lawyers of the duty owed to indigent defendants.

"In the recent decision of Twiford v. Peyton, 372 F.2d 670 (4th Cir. 1967), Judge Winter, speaking for this court, clearly pointed out that the practice of appointing counsel in a felony case so close to trial that the lawyer is not 'afforded a reasonable opportunity to investigate and prepare a case' is

inherently prejudicial, and a mere showing * * * [of the late time of appointment] constitutes a prima facie case of denial of effective assistance of counsel, so that the burden of proving lack of prejudice is shifted to the state.

372 F.2d at 670. (Emphasis supplied.)"
375 F.2d at 628

In Garland v. Cox, 472 F.2d 875 (4th Cir. 1973), cert. den. 414 U.S. 908, the Court of Appeals for the Fourth Circuit reaffirmed its adherence to the Fields rule that a showing of a late appointment of counsel constitutes a prima facie case of denial of effective assistance of counsel.

Although other circuits have not followed the Fields rule, nor does appellant contend the rule is constitutionally required, they are nonetheless in accord that late appointment of counsel is likely to be prejudicial to a defendant. In reversing a conviction for bank robbery, the

Court of Appeals in Moore v. United States, 432 F.2d 730 (3rd Cir. 1970) stated:

> "we do not intend to minimize the strong inference of prejudice from the failure to appoint counsel until the day of trial or very shortly prior thereto. Adequate preparation for trial often may be a more important element in the effective assistance of counsel to which a defendant is entitled than the forensic skill exhibited in the courtroom. The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of which even the defendant is unaware and may suggest issues and tactics at trial which would otherwise not emerge."
> 432 F.2d at 735

In Wolfs v. Britton, 509 F.2d 306 (8th Cir. 1975), defendant's counsel had been appointed one and a half days before trial. Request for a continuance on the day of trial was denied. In reversing the conviction, the Court noted:

> "The problem presented here is not that often encountered, where complaint is made of counsel's lack of skill at trial, that is, of his professional trial competence. Rather, our inquiry is whether the appointment of counsel one and one half days before trial was, under all the circumstances, so tardy as to preclude the giving of effective assistance of counsel.
>
> * * *
>
> "We stress, also, that although the adequacy of counsel cannot be determined solely on the basis of the amount of time spent in preparation, we cannot minimize the fact that effective assistance refers not only to forensic skills but to painstaking investigation in preparation for trial."
> 509 F.2d 308-309

It appears in the transcript (15a-16a) that Ms Terri's trial counsel, Marsnall G. Kaplan, Esq., was appointed on Friday, January 16, for a trial which began at 10:00 a.m. on Monday, the 19th; that Ms Terri did not learn of the change

of counsel until just before Court convened on the morning of the trial, when her total trial preparation consisted of 3 or 4 minutes' conference with the lawyer she then met for the first time; that her trial counsel never spoke to her previous assigned counsel, Joseph Lumbardo, Esq.; and that Ms Terri vigorously protested the inadequacy of preparation, but was overridden by the Court's administrative necessity to proceed:

> "Ms. Terri: Excuse me. Mr. Kaplan has [sic] just given to me this morning, I changed lawyers in midstream. How does he know anything about my case. How does he --
>
> "The Court: Did you discuss the situation with Mr. Lumbardo?
>
> "Mr. Kaplan: I talked with Mr. Corbitt [attorney for another defendant] quite a bit since Friday.
>
> "Mr. Corbitt: I spoke to Mr. Kaplan about it.
>
> "The Court: Have you had a chance to talk to Ms. Terri?
>
> "Mr. Kaplan: I spoke to her a few minutes this morning.
>
> * * *
>
> "The Court: Is there anything you wish to discuss with her right now?
>
> "Mr. Kaplan: Not right now.
>
> "The Court: Anything you wish to do?
>
> "Ms. Terri: I don't know what lawyers do with clients, but I know three minutes or four minutes that I spoke to him --
>
> "The Court: While we are waiting for the arrival of the other counsel in the case, do you want to discuss other aspects of the case with him?
>
> "Ms. Terri: I guess so."

(15a-16a.)

The Court then sent trial counsel and Ms Terri out of the courtroom to confer while evidentiary and jury matters proceeded in Court (16a-21a).

The foregoing was trial counsel's total opportunity to prepare to defend Ms Terri on felony charges in a trial which lasted 8 Court days. This was patently and hopelessly inadequate.

Ms Terri again brought the problem of ineffectiveness of counsel to the attention of the Court that afternoon (37a-40a), and specifically pointed to the impossibility of subpoenaing witnesses for her defense:

> " * * * I don't feel that I can be represented by this man.
>
> "He is writing down another case. He has not made any kind of approach for the witnesses. I don't understand how I can be represented right." (37a.)(Emphasis supplied)

She asked for the reassignment of her previous counsel (38a) and instead was offered only an opportunity to defend without counsel -- on a conspiracy indictment, probably the most complex criminal charge known to our law -- and accurately informed the Court that she was "not qualified" to do so:

> "Ms. Terri: When Mr. Lombardo comes back can he represent me?
>
> "The Court: If it is amenable to Mr. Kaplan.
>
> "Do you want to represent yourself?
>
> "Ms. Terri: I am not qualified. How can I?" (39a) (Emphasis supplied)

After an argument in which the Court cited to Ms Terri the sophisticated trial techniques of Henry Singer, Esq. (38a-39a), the Court left to her "own judgment" the choice between "carry[ing] on your own defense without counsel" (39a) and representation by Mr. Kaplan, who, the Court assured her, "has a very fine reputation" (40a).

Presented with this Hobson's choice, Ms Terri answered "Okay" (40a).

The Court assured Ms Terri that it would disqualify her counsel and assign new counsel only if "something comes to my attention that I find objectionable" (39a).

When, however, something which both the Court and Ms Terri found objectionable did occur -- her trial counsel's announcement on January 20 that on January 21 he had "a couple of closings" to attend and would absent himself from half the day of trial (247a-252a) -- the Court did not "disqualify" Mr. Kaplan, or appoint new counsel for Ms Terri, but permitted him to rely on her reluctant consent to his absence elicited on the basis of a mistake.

The Court's initial reaction to counsel's announcement that he would absent himself was "You can't" (247a). The Court realized that "The one who is going to be hurt is your client" (249a), and that the other defendants' attorneys who were to "cover" for Mr. Kaplan had "possible adverse interests" (249a). Ms Terri's consent to Mr. Kaplan's absence had been obtained

while she was under the impression that "the references to her now will be of a rather passing nature" (247a); the prosecuting attorney showed this impression to be false: "Your Honor, I said there will be testimony as to Miss Terri and Mr. Kaplan chose to characterize it as cumulative testimony" (250a). Despite these facts, Ms. Terri's consent to her assigned counsel's absence was permitted to stand. The Court indeed found the situation objectionable, and told Mr. Kaplan "I don't think you should take a case under these conditions" (252a). No other or separate counsel was provided for Ms Terri, however.

On the morning Mr. Kaplan was absent, January 21 (265a), there were in fact repeated and damaging references (266a, 267a) to the stolen goods being in "Janet Terri's house", which, although concededly false -- the house did not belong to her and the prosecution so stipulated (354a-355a) -- went unchallenged.

Ms Terri's foreboding that she could not be properly represented by an attorney unacquainted with her case, who had barely spoken to her before trial began (supra, pp. 16-18), who had no opportunity to investigate the facts or interview any witnesses (18a) or research recent developments in the law of conspiracy, was fully justified in the event.

Counsel made no effort to reform the indictment, which repeatedly names defendant as "Janet Terri, also known as Janet Ferry" and conveys the impression that she uses an alias or assumed name. "Ferry" is her married name, and "Terri" the

prosecution's spelling of her maiden name (72a); there was no excuse for the language of the indictment giving the impression that either name was false or assumed for criminal purposes. The names were set forth, in almost a side reference in the opening, before the jury heard any evidence at all (72a); but the indictment was of course before the jury to the conclusion of deliberations, and suggests that she is a criminal, habitually using an alias for nefarious purposes. The suggestion and its repetition throughout the indictment were obviously prejudicial.

There is no slightest suggestion in the record that Ms Terri had a criminal past. With the minimum opportunity to prepare a defense, competent representation demanded that she be put on the witness stand to testify in her own behalf, and to explain away the very little testimony which had been offered against her. The non-hearsay evidence consisted of testimony that unmarked bags and boxes were placed in a house owned by her parents, while she was out of the State, and that the bags and boxes were later removed. No testimony suggested that she was present during either the bringing-in of the packages or their removal, or that she ever had any physical contact with the stolen property. Counsel who first met her the day the trial began obviously could make no judgment of how she would impress a jury. Her failure to take the stand was necessarily prejudicial and demonstrates that she had less than effective assistance of counsel.

It borders upon outrageous incompetency for Ms Terri's assigned counsel to have attempted to "establish" by stipulation two facts all-important to her defense: the fact that the house in which the packages stood for a few days belonged, not to her, but to her parents; and the fact that she was in Massachusetts when the goods were placed in the basement.

A mere stipulation to significant facts could give the facts no emphasis whatever before the jury; it may indeed have raised suspicion in the jurors' minds about why no testimony was given on either point by Ms Terri, or her parents, or personnel of the resort at which she stayed in Massachusetts. There was no evidence of when her trip was planned or who accompanied her, for the jury to consider in determining whether she knew of the activity going on in her absence in her parents' house. Her testimony was essential to establish and reinforce the good faith of her absence to the jury.

Indeed, any evidentiary weight of the stipulation that Ms Terri was at Jug End Barn in South Egremont, Massachusetts, when the boxes were placed in the house, must have been dispelled from the jury's minds when the prosecutor said of it:

> "It was stipulated that Janet Terri was in Massachusetts at an inn on the 17th and 18th. No Government witness testified that she was there" (377a),

and the colloquy of Court and counsel endeavoring to correct it quickly developed into a series of statements of what "no Government witness" and "n[o]body testified" to.

The witnesses and documentary records of a hotel stay in Massachusetts, obtainable by subpoena to be served outside

the District of trial, would have impressed the jury far more than the dribbled-away stipulation. The record does not show even an application pursuant to Rule 17 (b) of the Federal Rules of Criminal Procedure for service of a subpoena without payment of mileage from Massachusetts, or subpoena fee, by Ms Terri as an indigent defendant. Effective assistance of counsel required pressing such an application and obtaining the testimony of a live witness and the material documents. Assigned counsel's endeavor to elide the application by producing "documents" Ms Terri had shown the FBI agent Walsh who visited her home, was defeated when the Court sustained the prosecutor's objection, outside the presence of the jury (309a, 312a).

Ms Terri's parents were located within the District and so were the title documents of the house at Harriet Place, Lynbrook. The parents' testimony and the deed to the house would have been much more impressive to the jury than

> "I also agree to stipulate that the house, and whatever address it is, Harriet Place, belongs to the parents of Janet Terri."
> (354a-355a)

This statement was not even made in the presence of the jury, and merely enabled counsel to refer to the ownership of the house on a few of the 88 pages of summations (357a-445a), as to which the jury was, of course, warned in advance to "Bear in mind the statements of counsel in summation are not evidence" (357a).

Neither of Ms Terri's parents was called to prove their ownership of the house, to testify to how access to the premises could be obtained, or to explain to the jury how access could be obtained without Ms Terri's knowledge. They not only owned but resided at the house (307a) and Agent Walsh saw them there (ibid.); they were the best source of evidence of who could have keys, what keys (if any) were needed to enter the house, and who might be responsible for it on March 17 and 21. Her parents' existence and the possibility of proof that they owned the house was repeatedly mentioned before the jury (e.g., in Mr. Kaplan's opening [75a] and in the testimony of the prosecution's principal witness, Schoenly, that they "probably" owned the house [217a]). Their failure to appear as witnesses necessarily appeared as a default in Ms. Terri's defense before the jury.

The lack of positive evidence that the house did not belong to Ms Terri enabled the prosecutor to refer repeatedly in his summation, despite the stipulation, to "Janet Terri's house", "Janet's house", "Janet's basement", "Janet's driveway", "the basement of Janet's house" (369a-377a). The repetitions obviously had far more impact than the modesty of the stipulation that the house, the basement, and the driveway did not belong to "Janet".

The reliance of assigned counsel on a stipulation instead of affirmative evidence of facts exculpatory of Ms Terri was so prejudicial as to require reversal.

The only witness counsel even attempted to call on Ms Terri's behalf was the Government investigator who interviewed her and searched her parents' house, fruitlessly, for signs that the stolen merchandise had been stored there (294a-312a). As set forth above (p. 23), evidence favorable to Ms Terri which assigned counsel sought to produce through Agent Walsh was excluded when the prosecution's objections were sustained on a preliminary hearing of the agent's testimony held, over Mr. Kaplan's objection, outside the presence of the jury.

Trial counsel was obviously handicapped throughout the trial by the lack of any opportunity to familiarize himself with the facts and prepare Ms Terri's defense. In his opening statement to the jury, Mr. Kaplan barely mentioned the facts of the case, since he did not know them. He presented no evidence on her behalf, relying on stipulation and cross-examination of witnesses. As a result, his summation was vague and inadequate, consisting of attacks upon the prosecution witnesses, and generalities (414a-429a); his references were twice (419a-420a, 422a) interrupted by objections and rulings that they were not supported by the record -- including his attempted argument (419a-421a) based upon the inadequate stipulation that Ms Terri was in Massachusetts on the critical evening of March 17th.

From the manner in which Ms Terri's defense was handled, the jury can have received only the impression that her counsel

was presenting a perfunctory defense for a presumably guilty client.

Ms Terri was charged with participation in a conspiracy, a notoriously difficult accusation against which to defend. She was assigned counsel at a late date, and barely spoke with him before being hastened to trial over her protests that his services in preparing her defense were non-existent. Counsel had no time to investigate the facts or prepare for trial, and, as a result, his performance was incompetent and ineffective, with prejudicial effect.

Appellant Janet Terri has been denied her Constitutional right to the effective assistance of counsel, and her conviction should accordingly be reversed.

CONCLUSION

The judgment of conviction should be reversed and the sentence vacated, and the case remanded for a new trial to be conducted according to proper constitutional standards.

Dated: New York, New York
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Respectfully submitted,

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From U.S. Attorney for the Eastern District

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